

Re-impeachment

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On Wednesday 6 January, [President Trump instructed his supporters](#) to march down to the Capitol and defend the members of Congress who planned to nullify the November 2020 election results. While Trump didn't explicitly order his followers to break into the Capitol and attack those who were ready to certify his opponent as the victor, he whipped the crowd into a frenzy by asserting that they would "never take back our country with weakness. You have to show strength and you have to be strong." After [a months-long campaign](#) to convince his supporters that he had been wronged and he needed "patriots" to prevent him from being forced out of office, they knew what he wanted them to do.

One week later, on Wednesday 13 January, Trump was impeached by the House of Representatives for having [incited insurrection](#).

Trump thus became the only President in US history to have been re-impeached. He was re-impeachable because he was not convicted and removed a year earlier when the House of Representatives [impeached \(indicted\) him](#) the first time for "high crimes and misdemeanors." Trump was at that time accused of having withheld congressionally allocated aid to a foreign leader unless that foreign leader manufactured evidence to help Trump win the election. Republicans in the first impeachment trial in the US Senate trivialized Trump's exploitation of office for personal electoral gain. They now have a second chance to recognize that Trump has long been willing to do whatever was necessary to stay in power, including taking American democracy down with him. A failure to convict now would indicate that Trump's party no longer reliably defends the peaceful transfer of power after a free and fair election.

It would have been far better for the country if Trump had resigned in shame after his supporters attacked Congress, putting an end to his followers' campaign to keep him in power regardless of the election results. But he is shameless and he would not voluntarily leave office.

It also would have been far better if the Vice-President and Cabinet had invoked the [25th Amendment](#) to the Constitution to immediately remove a dangerous president from power. But Trump's inner circle had qualified for their jobs by being grovelingly loyal, so they either [slunk away](#) while pretending to have resigned on principle, or [they acted as though nothing was terribly wrong](#). The House of Representatives formally asked the Vice President to invoke the 25th Amendment. [He refused](#).

That left impeachment. The first impeachment almost exactly one year ago was based on a straight party-line vote with no Republican support. Re-impeachment brought 10 Republicans ([out of 211](#)) across the aisle to vote with the Democrats. But more than 200 Republicans in the House of Representatives thought that a

president's provoking an attack on a joint session of Congress as it was about to certify that the president had lost an election did not qualify as a "high crime or misdemeanor." Fully 138 members of the House of Representatives and seven Senators had even [voted to reject the election results](#) when Congress certified Joe Biden as the election's winner. Trump is still being backed by much of his party in the "big lie" that he won the 2020 election.

The election certification did go forward and Trump, then, will cease to be president at the appointed time. But he is reported to be [angry and resentful](#) while still holding the full power of the presidency, in a Washington DC with 20,000 National Guard troops in the streets to guard against violence from his supporters. The transfer of power will occur against an uneasy peace at best as the current occupant of the presidency still refuses to concede his defeat.

The Impeachment Trial as a Double-Edged Sword

Despite the urgency of removing from office a president who is still eager to deny the results of the election and still willing to stoke violence, Senate Majority Leader Mitch McConnell refused to call his chamber back into session to hold a trial.

But why is McConnell still calling the shots? Didn't the Democrats just win the Senate? Not yet. First, the [two newly elected Georgia senators](#) have still to be sworn in, and their elections were [not certified until Friday](#). When they join the Senate, there will be a 50-50 tie. But until Kamala Harris has been sworn in as vice-president on 20 January, Vice-President Pence breaks party ties. So Chuck Schumer only becomes majority leader after the narrowest of narrow majorities is in place. Until then, the Senate is still under Republican control. And it has not acted swiftly to protect the country from a dangerous president.

The second Trump impeachment trial will now take place after Biden's inauguration and after Trump is gone. Because the immediate danger will have passed, an impeachment trial may seem pointless. Already, [Republican legal experts are circling like birds of prey](#), ready to claim that the Constitution bars holding a trial after the impeached official has left office so Trump should go scot-free. But the [historical record clearly says otherwise](#): three impeachments of sitting officials resulted in [trials that took place](#) after they had left government. As long as the impeachment occurs while the person still holds office, the trial can take place later.

Why would it be worth having an impeachment trial after removal from office is moot? Conviction upon impeachment doesn't just permit removal of a tainted official from office; it also allows the Congress, by a simple majority vote after a conviction, to disqualify that person from holding government office ever again. Moreover, [many benefits follow an office-holder](#) out of office. The US President receives a pension, a generous travel allowance, money for an office and staff, a lifetime security detail and more. Conviction after impeachment allows those benefits to be blocked.

A conviction is far from a sure thing, however, as it requires two-thirds of the Senate to agree, and that means that 17 Republicans would have to vote against Trump. But

even [Mitch McConnell has indicated](#) that he may be open to convicting Trump. He and some of his fellow party members are starting to imagine that their party might be better off if they bar Trump's comeback. As Trump's immediate power to attack fellow Republicans fades, preventing Trump from running for the presidency again may well appeal to more Republicans than we can now count. So it is not crazy to think that Trump could be convicted. But the result will depend more on calculations of self-interest than on a judgment about the public interest in preserving democratic government.

Whenever it occurs, however, a Senate impeachment trial would tie the entire Senate up in knots for a long time. Presided over by the Chief Justice of the Supreme Court, the trial requires all 100 senators to constitute the jury, which means that every single senator must sit in the Senate chamber all day, every day of the trial, doing nothing else. Trump's first impeachment trial was rushed because the Republican leadership refused to call witnesses and yet it still ran from 16 January through 5 February 2020. A second impeachment trial is likely to be more complicated and longer, as the Democrats will surely call witnesses and present evidence, even as the charge at the center of the case will be tried before 100 eye-witnesses to the underlying event.

Democrats would control the process this time, but the re-impeachment trial is perilous for them. Trump can still win. Moreover, his right to be heard at the impeachment trial means that he can spin out his crazy claims, rile up his supporters, strike fear into the hearts of his fellow Republicans, and escape punishment again. He will be given the platform of all platforms on which to espouse his version of reality, dominating the media landscape as he so loves to do.

In addition, a second impeachment trial presents an opportunity for Trump to dominate the political process again – this time to destroy his successor's typically most productive period in office in the first 100 days. If the entire Senate is sitting as a jury on the outrages of a president no longer in office, it cannot hold confirmation hearings to get the new president's team in place. It cannot legislate. Biden urgently needs the Senate to devote all of its time to his new administration because he starts off behind schedule. But they will be focusing on Trump instead.

Because Trump was unwilling to concede and therefore the Republicans in the Senate were not convinced there would be a transition, precisely none of Biden's cabinet picks have been confirmed by the Senate yet. So, [alone among recent presidents](#), Biden will take office without a single member of his cabinet ready to join him, despite having made timely nominations. The clear intent of the Republican leadership since the election has been to prevent Biden from being able to govern effectively and perhaps at all. At least some Republicans are now delighted that the rush to impeach Trump again allows Biden's nominees to be blocked and further delays action on Biden's ambitious legislative agenda. If Republicans can't hold the White House, they don't want Democrats to be able to accomplish anything through their control of both houses of Congress and the presidency. Trying Trump is the perfect way to prevent Biden from being effective.

Because Democrats will be in charge, however, they have been trying to find a way “[to walk and chew gum](#)” at the same time. The Senate Parliamentarian has been asked if the Senate can conduct other business in the morning and hold the trial in the afternoon. House Majority Whip [James Clyburn](#) has proposed that the trial not start until 100 days into Biden’s term, given that Trump’s departure from office reduces the urgency. The logistics of the trial have not yet been worked out but one hopes that Trump will not continue to set the agenda for the new administration beyond his term in office. Just how the Senate will organize its turn to the overflowing agenda of the new administration and also bring Trump to justice, however, is still an open question.

Evidence of an Insurrection

As I write, less than two weeks have passed since the riot at the Capitol, but we have already learned that what happened there is very different from first impressions. At first, the riots looked like a fraternity’s drunk Halloween party as the mob [stormed the Capitol and wandered around aimlessly taking selfies](#). We now know that the mob also beat up [dozens of police](#) (brutally killing one and injuring nearly 60 others), [hunted down the Vice President](#) while chanting that they wanted to kill him, [ransacked offices of the Democratic leadership](#) of the Congress (including disabling [the alarm system](#) through which representatives could have called for help) [and stole computers containing classified information](#). Five people died.

Many people recognized friends and family among the rioters and have come forward to turn them in. Investigators, flooded with new evidence, are now focusing on whether some of those in the mob constituted [capture-and-kill teams](#) aiming to [kidnap and/or murder Trump’s opponents](#) in Congress. Many in the mob were fitted out with serious [weapons](#). Many [former and current military officers as well as police](#) and others with serious professional training in the deployment of violence were among those who breached the Capitol. Far from a pranking set of overzealous “patriots” in ridiculous costumes, the mob now seems to have been [far more capable of pulling off a coup](#) than we initially knew.

In addition, it seems increasingly likely that the Capitol Hill riot was [an inside job](#). Some of the [Capitol Hill police](#) were ready to open the gates to the marauding hordes. Some police posed for selfies with the rioters and even gave directions to those seeking particular offices. [Some of Trump’s partisan defenders in Congress](#) may have assisted the rioters to find their way around by giving unauthorized tours the day before so that they could locate the likely whereabouts of targeted officials. The Defense Department, headed by a recently installed amateur team of Trump’s supporters, [limited the ability](#) of the National Guard to respond that day so that there was no effective response for hours. Despite many warnings, [security](#) utterly failed because intelligence was never taken seriously. Was it because Trump’s minions in government positions ordered them all to stand down? The question must be answered. Now, inspectors general from the Defense, Homeland Security, Justice and Interior Departments have [opened a major investigation](#) into why a clear and serious threat, known well in advance, was met with little planning or effective response. (Inspectors general are independent officials who monitor whether their

agencies are acting lawfully.) The House has also [opened its own probe](#). The Senate trial for impeachment should not proceed until we know more about how far the collusion spread. That alone is reason to delay a trial.

A pause before trial will also allow Trump's 6 January rally speech to be put in perspective. It capped [a months-long campaign](#) in which Trump asserted without evidence that the 2020 American election was stolen from him. Trump generated a profusion of unsubstantiated and weirdly specific claims: [Dominion-brand voting machines](#) were tampered with by Venezuela; [1500 dead people voted in Nevada](#); [voter turnout was 139% in Detroit](#). Trump tried to get Democratic ballots thrown out in more than 50 [baseless lawsuits](#) that even his own judicial appointees refused to countenance. Then he tried to get state election officials either to ["find" additional votes for him](#) or to [refuse to certify the results](#), designed to start a complex procedure through which the House of Representatives could eventually select the president directly. The insurrection was just the final step after all else failed. But it was always there in reserve after Trump stoked the fires of sedition for months. The trial should not just focus on the events of 6 January, but should consider the whole conspiracy to keep Trump in office even after he was voted out.

The results of these investigations can help the Senate to assess the magnitude of the danger that Trump posed. If this stream of new information is right, then a combination of outside planning and inside coordination aimed at blocking the democratic rotation of power. Given that the impeachment trial can't remove Trump in time to protect the country from a rogue president, it can and should assess whether this really was an attempted coup. One would hope that even his Senate supporters would, with that evidence, be willing to convict him and ensure that he can never be president again.

Private-Sector Punishment

Despite the shock and urgency of the 6 January Capitol Hill riot, federal public institutions have moved painfully slowly. A delay in the start of the impeachment trial will ensure an even slower response. Even though there were swifter ways to remove a dangerous president, no one with the power to do so was willing or able to do it.

But the private sector acted quickly, and that may have saved the United States from an even worst fate in the moment. Twitter took down Trump's famously active account after the Capitol was attacked, first for 12 hours, and [then permanently](#). [Facebook cut Trump](#) off too, as did [YouTube](#). As Trump and his followers scrambled to communicate with each other again, other tech giants stepped in. Apple and Google suspended the unmoderated and toxic [Parler](#) platform from its app stores before Amazon swept in for the kill by denying it cloud services. Almost immediately, the [level of disinformation dropped](#). And though the [FBI had warned](#) that Trump's supporters would stage violent protests at state capitals across the country on the weekend before the inauguration, so far those armed rallies have fizzled.

Could the US have been finally and most effectively defended by its tech giants?

The whole private sector is doubling down by ostracizing Trump, his properties and his allies in Congress. In a move said to bother Trump more than any other, the [Professional Golf Association announced](#) that it would not hold an important golf tournament in 2022 at Trump's New Jersey golf course. [Deutsche Bank](#), which has long bailed out Trump when no other bank would go near him, finally washed its hands of Trump, as have many major corporations that had once been Trump's donors. The growing list of major corporations now shunning Trump and those in the Congress who voted to deny certification to the election results is [here](#).

[Angela Merkel responded with alarm](#) to the speed and thoroughness with which a sitting president could be de-platformed. Her response makes sense against the backdrop of German constitutional law in which major concentrations of power, public and private, are accountable to public law norms even if their ownership structures are not public. When Big Tech separates a political leader from his followers, as happened to Trump, it seems like a constitutional problem. And it would be in Germany.

But the US doesn't have that constitutional backdrop. The US doesn't even have the power to enforce public law norms against public officials. As we have seen all through Trump's term of office, public officials – including police – cannot be easily held accountable under constitutional standards, given the [doctrine of qualified immunity](#). The immunity and impunity go all the way to the top: The Department of Justice has long held that [a sitting president cannot be indicted for a crime](#), and one of [Trump's lawyers even argued in court](#) that if Trump had followed through with his famous boast and shot someone dead in the middle of New York's Fifth Avenue, the murder could not even be investigated until after Trump left office. Trump has even used the pardon power to free many of those who have helped him evade investigation so far, and before he leaves office in a few days, most [people expect him to pardon all those who helped him evade accountability, including himself](#). American public law is terrible at holding leaders to account.

Into this vacuum of public accountability, the American private sector is now stepping in. It does so with no public law controls on its procedural regularity, standards of evidence or required respect for public-sector rights, so I understand Angela Merkel's reservations. But in the US, private law can sometimes accomplish what public law cannot, given how flawed our public law is. Just in this election cycle, for example, some of the lies about the election were silenced when [Dominion Voting Systems filed a libel case](#) against the chief liar. The power can of course be abused. Before he became president, Trump and his companies were involved in some [4,000 lawsuits](#), including many libel actions, to silence his critics. Rogue private power can be dangerous. In this case, however, it may just have saved American democracy because it cut Trump off from his supporters at just the moment when they may have been instructed to prevent the transfer of power to Trump's successor.

Trump is finally getting a taste of his own medicine. He was a product of the private sector and he will meet his social death in the private sector. The private sector has decided to exclude him from polite company. Public law accountability is the hallmark of any constitutional government worthy of the name precisely because it would be less arbitrary. But private law accountability is better than nothing. Given

that we don't know how the impeachment trial will turn out, and given that Trump's fellow Republicans do not yet seem ready to cut themselves lose from him, private retribution may be all we have.

